

Athina Kotzabasi

Professor of Civil Law, Faculty of Law, Aristotle University of Thessaloniki

Bonds of love or bonds of blood?

-children on the *borderline* of social and natural kinship-

I. Introduction

The kinship relation between a child and his/her genetic parents constitutes the *primary legal bond of every natural person*, which is defined by law (ex lege) through provisions of peremptory norm that cannot be by-passed or modified by the personal volition of the persons in question, meaning that they are not subject to agreements between the persons involved. Of course the volition of the father always proves of definitive significance for the establishment of a family in *voluntary acknowledgement*, however, on the all too clear condition that there exists a blood relation between the father and the child, which means that the man explicitly declaring his will is indeed the biological father of the child, otherwise the law provides for the possibility of voluntary acknowledgement contestation (1477 CC).

Concerning the establishment of kinship between a child and their father and mother the civil code, even today, looks back to primordial rules and uses the legal technique of presumptions¹. Through their reliance on legal presumptions nature and law are intertwined in a harmonious way, and have been doing so since the times of Roman law. For law to provide an answer to the question of *what* fatherhood is and *what* motherhood is it resorts to the bipole of *n a t u r e / l a w*, stipulating that labour, which is nature in the act, indicates motherhood as a rule (*matter semper certa est*), while fatherhood is denoted through marriage as a rule (*..pater est quem nuptiae demonstant* -the father is demonstrated by marriage). In other words, the legal presumptions of articles 1465 and 1466 CC, are based on marriage and stipulate that it is the husband of the mother, when she is married, that is the father of the child while

¹ Presumptions of law constitute a legislative technique whereby the legislator is led to a conclusion by a real fact (a natural fact like childbirth or a legal fact like marriage). Presumptions of law are distinguished in rebuttable and irrebuttable, depending on whether it is allowed to question a given presumption and use due proof in doing so and are conceptually different from judicial presumptions of fact. See *N. Paisidou*, Judicial presumptions in civil litigation cases, PhD Thesis (1991), p. 51 *et seq.*

when the mother is unmarried the legislator tries to identify fatherhood by using the presumption of sexual intercourse. Therefore, under article 1481 of the Civil Code it is stipulated that when a child is born to an unmarried woman the father is the man with whom the woman had had sexual contact with during the crucial period of conception, even if this had happened for only a single time.

The presumptions concerning the kinship of a child with the father emanate from self-explanatory and logical assumptions, such as the fact the the child born *inside a marriage* is the offspring of the woman that gave birth to him/her (1465 CC) or that the child born *while the mother is not married* has as a father the man with whom the woman had a sexual relationship with during the crucial time of the conception (1481 CC). These primordial rules are based on the different biological nature of men and women, respectively. In other words, in kinship law we can observe *a primary connection between law and nature*, where the law, *which alludes to marriage, defines fatherhood as a rule, while nature, i.e. labour, defines motherhood as a rule*².

The recent³ law about assisted reproduction has given, however, the spouses, registered partners and partners living together without marriage or civil agreement, as well as to single women, the ability to have children through medical assistance, namely three new ways of assisted reproduction: by means of *third party genetic material* (1456 §1 par.b, 1460, 1475 § 2) *after their death* (post-mortem fertilization, 1457 CC) or *surrogacy* (gestation by another woman, 1458 CC). The basic requirement for this radical change in kinship law is the consent of the parties involved.

The pre-requisite for this radical change in the law of kinship lies in the consent of the stakeholders. In other words, the law acknowledges the autonomy of natural persons who may wish to have a *child with no sexual intercourse* but through in vitro fertilization and due consent is *acknowledged as the establishing cause for this exception*, which is why this kinship is called socio-emotional kinship.

The legitimizing reason behind this divergence from the natural rule of sexual intimacy, provided for under law 3089/2002, is the inability to have children in the

² Cf. M. Maropoulou, The artificial womb, Nea Estia Publ, 9/ 2010, p.299.

³ The 3089/ 2002 law is characterised as recent compared to the two-thousand old single regulation of kinship of the civil code, especially in what concerns the mother, for whom kinship has been established exclusively through childbirth according to the Roman rule of *matter semper certa est* (the mother is always certain), which is an axiom that was questioned only recently through the legislation of surrogacy.

natural way, i.e. *the existence of a medical inability to procreate*. These two basic requirements, - (a) the consent of the parties involved and (b) the inability to procreate naturally -, render the introduction of private autonomy in family law consistent with the constitution -according to the pertinent 3357/2010 ruling of the Athens Court of Appeals (Annals of Private Law Review II/2013.508).

The legislator of law 3089/2002, who was called upon to regulate medically assisted reproduction for the very first time, stipulated limits and requirements concerning the permissibility of medical intervention. In other words, the legislator specified the necessary conditions on which private autonomy can lead to the establishment of kinship between a child and his/her parents, when the child is not their biological offspring. However, despite the fact that the law was quite permissive or liberal, as it is usually said, the kinship between the child and the parents cannot be established on the grounds of the initiative or volition of the parents to undergo medically assisted reproduction, if the legal requirements governing MAR are not abided by. Therefore, what is medically possible is not necessarily legally permissible- or incidentally- socially desirable.

Apart from the above guiding principles governing the law of medically assisted reproduction, there exist some other, more specialised requirements, such as the *age* of the persons seeking assistance, the *type* of the consent granted and, most importantly, the *court permission*, which is required in the cases of post-mortem fertilization and surrogacy. Therefore, the problems in establishing kinship can occur: first and foremost, when there is no due consent of the parties involved **or** there is no medical need **or** when there is no judicial permission for either post-mortem fertilization or surrogacy. In these cases we could say, first of all, that since the legal requirements do not apply *no kinship can be established* between the child and the social parents but only with the genetic parents, and the *novelty in medically assisted reproduction is that it is possible that no kinship can be established between the child and the mother herself, as it so happens in the two cases I shall present to you, both of which regard surrogacy, one on behalf of the grandmother and the other on behalf of a single, unmarried man*.

It should be mentioned, however, that when cases where legal requirements had not been abided by ended up in court, the judge proved extremely lenient in what concerns due compliance, as it so happened in the case where the court granted judicial permission for surrogate pregnancy when in fact *the fertilized eggs had*

*already been transferred in the womb of the surrogate mother*⁴, which is something that is not permitted, or also when the court granted permission for post-mortem fertilization *while there was no notarial deed containing the consent of the deceased*, but the only thing that existed was the statement of the deceased in a hand-written will and testament (which was not written by a notary public)⁵, obviously in the light of the adverse consequences for the child in case the petition was rejected on the grounds of de facto events.

However, the dispute of social kinship occurs mainly when a cumulative combination of many forms of in vitro fertilization is endeavoured, i.e when it is attempted to cumulatively and concurrently apply all three forms of assisted reproduction- as it so happens when we have surrogacy through heterologous fertilization or post-mortem fertilization with surrogacy, heterologous fertilization without due paternal consent or fertilization of a single woman with the sperm of a known third party donor etc.

In the absence of legal requirements the natural bond between the child and the mother is determined only through labour, thereby the child's mother is the woman that “gives birth” to him/her and this applies mainly to illegal surrogacy. According to some opinions, demonstrating the fact that in science there is no consensus over the matter, surrogacy should be allowed only when the eggs come from the very woman that wants to have the child⁶ or it should be allowed only in the event of medical inability of the woman to procreate⁷ and that it should not be allowed for men, respectively⁸ or it should be permitted only for fertilization during a person's life and not post mortem⁹, while the second opinion accepts that it can be performed post mortem for the surviving man-spouse¹⁰, while post mortem fertilization can also be heterologous¹¹, on condition that there exists a due notarial consent already.

⁴ Thessaloniki CoFI 27035/2003 Armenopoulos journal 58(2004). 225.

⁵ Athens CoFI 5146/2007 EfAD legal journal 3(2010). 940 with comments by *Th. Trokanas*.

⁶ *Koutsouradis*, Surrogacy topics, Hon Vol for Ioannis Manoledakis, 858/9.

⁷ See *Papadopoulou-Klamari*, Kinship (2010), p. 223` *Kotzabasi*, Equality of genders and private autonomy (2011), p. 145` *Pandelidou*, Equal treatment and medical assistance in human reproduction, EfAD legal journal 2001/3.243(247).

⁸ In favour of acknowledging this possibility for men, too, see *Kounougeri- Manoledaki*, commentary on the 2827/2008 ruling of the one member Athens CoFI, IDB, issue 9/2010` *Papachristou*, comments on the same ruling, Annals of Private Law, 9/2009.818` *Koumoutzis in the Georgiadis- Stathopoulos CC*, articles 1457-1458 no. 79.

⁹ *Papachristou*, Family Law practice manual, p.216.

¹⁰ *Kounougeri -Manoledaki*, Family Law⁵ II, p. 57.

¹¹ *Papachristou*, Family Law Practice manual, p. 216. That it has to be homologous, vide. *Kounougeri-Manoledaki*, Family Law, p. 21

The questionable cases are bound to lead to the birth of a child whose kinship relations will be *in dispute*, which means that these children are on the borderline between social and natural kinship. However, it is unanimously accepted that post mortem fertilization and surrogacy *without the necessary court permission* cannot establish kinship between the child and the social parents. The issue of non-compliance with the strict requirements, especially the court permission for surrogacy and post mortem fertilization, according to consensus of opinions, leads to the *inability to establish kinship with the social mother* and, by consequence, to the *subsequent kinship with the social father* while in the post mortem cases it leads to the inability to establish kinship with the deceased father. This means that since the requirements stipulated under articles 1457 and 1458 CC are not complied with, the consequences provided for under articles 1465 §2 and 1464 CC do not apply.

In fact, it is claimed that gestation by another woman with no court permission cannot even lead to later stage adoption of the child by the social parents because this would in fact constitute a blatant violation of the provisions regulating assisted reproduction¹². Therefore, in effect it is questionable whether the child born through in vitro fertilization can actually be adopted at a later stage by his/her very social parents.

The novelty in in vitro fertilization in the case of illegal reproduction is, for all intents and purposes, that in fact it may prove impossible to establish **either a social or a natural kinship of the child not only with the father but also with the mother as well**, as it finally happened in the above two cases that were tried by the Greek courts.

The issue of the children who are devoid of kinship is not simple at all; in fact it is a complicated legal matter mainly for the child born, since the *establishment of a child's kinship relations I believe constitutes a human right* on the basis of the constitutional protection of human dignity (article 2 C), childhood (article 21 C) and private life (article 9 C, article 8 ECHR) but also on the basis of the right of children to family life, which is guaranteed under article 8 of the International Convention for the Rights of Children.

Nevertheless, it must be emphasized that the *natural fact of child labour* is a fundamental fact both for the connection of the child with the mother (kinship) and

¹² See Papachristou, In vitro fertilization, p. 76` contr. Kounougeri- Manoledaki, Family law⁵ II, p. 101/2`, by the same author, surrogacy and adoption, p. 168.

for the relation of the child with the state (citizenship) either through the mother, under the law of blood relation, or through the birthplace. *Labour*, as an indisputable natural fact is *a fact establishing both kinship and nationality*. Therefore the breach of surrogacy requirements, whenever and wherever surrogacy is permitted, leads at the same time to problems pertinent to both family law and nationality law.

The birth of a child abroad through the use of a surrogate mother has repeatedly concerned many countries quite extensively, especially those countries which do not provide for the practice of surrogacy, such as France and Germany. Aiming at safeguarding prohibition these countries did not permit either the registration of the children in question in public registries or the acquisition of citizenship for the children of French or German nationals who were born abroad (Ukraine, India, America or Greece) through a surrogate mother, even though the cases involved couples where the woman was medically unable to carry the child herself, something which is by all means permitted for us. So it was decided that the children born to surrogates abroad are not to be granted German citizenship status or registered in registries as their own children¹³. This issue generated a long discussion and recently led to the sentence of France by the ECJ (*Menesson versus France*) thereby obliging France to allow the registration in the registry office of the child born abroad (through surrogacy) and was the biological child of a French woman (blood relation)- which is an issue that I believe Mr Trokanas will present- and I think that it will also concern the European legal order soon.

II. A case of surrogacy and post mortem fertilization that took place abroad (Russia) on behalf of the grandmother, who was a permanent resident of Greece and in the case of whom the requirements of articles 1457- 1458 CC were not complied with and later adoption of the children by herself (One member CoFI of Thessaloniki 7013/2013 Armenopoulos journal 2013.1291).

The Thessaloniki Court of First Instance was faced with a case of *illegal surrogacy and illegal post mortem fertilization* at the same time. It concerned a woman, a doctor by profession, permanent resident of Greece and originally from Russia who worked in Greece (Thessaloniki) as a Technological Educational Institute teacher. The woman in question, because of her son's death and before actual death

¹³ 16-7 CC-French CC. "Every contract which regards substitution or surrogacy by third parties is null and void" in : Bioethics, [http: //www.bioethics.gr](http://www.bioethics.gr)

following a road accident, retrieved her son's sperm (illegally) and then went to Russia where she used two surrogate mothers and as a result had four grandchildren (three boys and a girl). Then she tried to be acknowledged as the mother of the children in Greece but since this proved impossible she went to Russia anew, where by Court ruling of the Moscow Court she adopted the four children. Then she came to Greece again and asked the Court to acknowledge the adoption ruling of the foreign court, which stipulates that she is the foster mother of these children, so that the ruling could also be valid in Greece (article 28, law 12452/1983).

The Thessaloniki Court¹⁴ of First Instance rejected the petition to acknowledge a foreign court adoption decision on the grounds that it contravenes the Greek public order, because the children were born to surrogate mothers and post mortem fertilization and at the same time the legal requirements had not been abided by. This applied because (a) there was no consent of the deceased person (son of the foster mother) for post mortem fertilization, not even a simple written consent, (b) she herself was not a woman/ mother who wanted to have children but their biological grandmother, who was already 58 years old and therefore she had exceeded the legal age eligible for medically assisted reproduction, (c) there was no court permission for either surrogacy or post mortem fertilization, and (d) -and perhaps most importantly-, there had been full substitution in gestation, that is the eggs came from the surrogate mothers, which is a fact that is strictly prohibited under the Greek civil code. In other words the surrogate gestation that took place in Russia was in full contravention with Greek public order, mainly because the sperm donor had never been either a husband or a partner of the mother while surrogacy was full, meaning that the surrogate mothers actually donated their own eggs.

After all, according to the relevant documents submitted to court it was judged that the adoption itself also contravened the Greek public order, since from the adoption certificates it came out that on them the name of the mother written down was that of their biological grandmother and her son was registered as their biological father. This adoption ruling, which was registered as unappealable in the Moscow Registry was considered by the Thessaloniki Court to be in total contravention of the Greek public order, because “*...it would stake the systematic and evaluative unity both of family law and of private law in general...*” and runs contrary to “*commonly*

¹⁴ Thessaloniki one-member CoFI, 7013/ 2013. 1291

accepted mentalities which have been invariably governing and regulating living relations in Greece..”. Thus in this way the adoption remained deficient(it is valid only in Russia) and for the first time ever- in Greece too- there was a line drawn in *illegal surrogate gestation*.

III. The second case that was brought before the Greek courts was related again to surrogacy but that time commissioned by a man (One member CoFI of Athens 2827/2008, Nomiko Vima Hellenic Law Review 2012.1437¹⁵, One member CoFI of Thessaloniki 13707/2009 Annals of Private Law 2011.267¹⁶ Athens CoA 3357/2010 Annals of Private Law II/2013.508¹⁷).

The Court of First Instance of Athens and the Thessaloniki CoFi, with two identical rulings in terms of rationale granted permission for surrogacy to two different single, unmarried men upon their request, thereby establishing their right to medical assistance, since they were infertile by analogy of law. That is, based on the principle of equality among citizens before the law and also in accordance with the principle of gender equality, since the right of access to medically assisted reproduction is legislated for infertile, single, unmarried women the judges also acknowledged that the same right should be granted by analogy to unmarried, single men.

After the granting of permission fertilized eggs were implanted in a surrogate woman (with sperm and eggs donated by third party donors) and thus the above two men finally had the children they desired. In fact, by opinion number 261/2010 of the Legal Council of the Hellenic State (LCHS)¹⁵, it was decided that the surrogate mother would be registered as the legal mother of the children in the Public Registry.

Afterwards however, the Athens CoFI Public Prosecutor lodged an appeal against the ruling of the Court of First Instance, through which the CoFI ruling was invalidated. The rationale of the court of Appeals ruling, which was based on the combined interpretation of articles 1463, 1464 §1, 1458 and 1456 § 1 CC by contradistinction, acknowledged that medical assistance requires inability to procreate for medical reasons and not biological ones, which means that it acknowledged that surrogacy is reserved only for the *medical inability of women for gestation*.

¹⁵ EfAD legal journal 11/2010.1205

After the Athens Court of Appeals repealed the ruling whereby court permission was granted, the question that arises is what will be the legal consequence of this revocation in the kinship relation of the children with their father (the children born were twins). Of course it should be mentioned that in this case not only the consequence of prior ruling invalidation is in dispute but also the establishment of kinship between children and father. According to one opinion the legal bond with the father is established based on the presumption of motherhood under article 1464 CC which is applicable by analogy of law (or rather *mutatis mutandis*) in view of the court permission granted¹⁶, while according to another opinion¹⁷, in view of the fact that fatherhood is subsequent of motherhood it cannot be established under CC article 1464 but either a voluntary or a court acknowledgement is necessary -and in fact only notarial consent given by the man before in vitro fertilization can be regarded as such (1456 §2 par b CC).

After all, the revocation of court permission in a sense reverses the application of the presumption with retrospective effect¹⁸ (*ex tunc* -from the moment the ruling was issued) and therefore the twins *have no kinship relation with the father* as it also happens with the mother, according to prevalent opinions. Therefore they are *children with no mother and no father*.

According to another opinion, however, the invalidation of the first ruling has no retrospective effect¹⁹ or, for all intents and purposes, by revocation of the ruling the consequences of the bona fide disbursements made by the agent should not be encroached on, according to the provision of article 779 of the CCP. Despite the fact that the above article makes mention to financial transactions, there can be an application by analogy to personal relations²⁰. Consequently, in accordance with this point of view, the children go on having a father, the man to whom permission for

¹⁶ Koumoutzis, The revocation of court permission for in vitro fertilization, *Annals of Private law* II/2013 p.552 *et seq.*

¹⁷ Papadopoulou- Klamari, Reversal or invalidation of court ruling whereby permission to use surrogacy was granted, *Annals of Private Law* II/2013, p.549 *et seq.*

¹⁸ Papachristou, *Family Law practice manual*³, p.273 *et seq.* Foundedaki, in CC of Georgiadis-Stathopoulos², article 1465, no. 62` idem, The husband's presumption of paternity in the case of post mortem artificial insemination, *honVol Manoledaki III*, p. 971/2` Pourmaras, in Georgiadis, *SEAK manual II*, article 1465, p. 23 in fine.

¹⁹ Koumoutzis, The revocation of court permission for medically assisted reproduction, *Annals of Private Law* II/2013.552 (553), because the constitutionally protected right to family life is encroached on (9 §1 par. b C and 8 §1 ECHR)

²⁰ Also by Papadopoulou- Klamari, Reversal or invalidation of voluntary jurisdiction decision whereby permission was granted to use a surrogate, *Annals of Private Law* II/2013.549 (550) with further citations

surrogacy was granted, either under article 1464 CC or by indirect or by direct application of article 1456 §1 CC regarding voluntary acknowledgement. Therefore, it would be advisable to proceed to an *explicit legislative provision* with modification of articles 1457 and 1458, *concerning the required degree of decision readiness of a court ruling n so that it can be regarded as irrevocable.*

IV. Case of paternity contestation, when children are born inside marriage by means of heterologous or even homologous fertilization, due to irregularities in the due consent of the medically assisted persons (Ruling 823/2013 Nomos Legal Review, Piraeus CoA 328/2009 Isokratis).

In the particular recent case, which was brought before the courts and was finally judged by the Supreme Court, the matter regarded the fatherhood of twin children who were born inside marriage by means of medically assisted homologous reproduction, meaning with sperm from the husband, without however ***due written consent*** of the two spouses kept in the registry of the medical centre, as it is required in accordance with article 1456 §1 par a CC. Because of this violation the father claimed in court that the in vitro fertilization was realised without his written consent but following fraudulent retrieval of genetic material and that was why he asked that fatherhood be contested under CC provision 1471 §2 item. 2. The above provision gives the father the right to contest the fatherhood of a child born inside a marriage when consent to medically assisted reproduction has not been given by him beforehand.

The Supreme Court, exactly in the same way as the court of appeals²¹, acknowledged²² that the husband's consent on one hand and the agreement on the other hand, for medically assisted reproduction, constitute two different legal actions. One is an informal internal agreement, which concerns the personal relations of two spouses and can be made either in writing or orally, even tacitly in fact, while the other is an external contract that is also addressed to third parties, like the doctor involved in the process. Thus the former, as an informal acquiescence falls under the factual component of article 1471 §2 item 2 CC, which excludes the contestation of fatherhood irrespective of the *legitimacy of the medical act*, which was performed

²¹ Piraeus CoA 328/2009 Isokratis (Legal Information Bank)

²² Ruling 823/2013 Law (Legal Information Bank)

without the written consent of the parties involved. However, in the domain of scientific theory the opposite opinion is extensively held²³ meaning that both the acquiescence stipulated under article 1471 §2 item 2, and the consent stipulated by article 1456 §1 item b are in fact conceptually identical and therefore, when there is no written consent of the parties involved, free from volition-related defects which may regard cases of misrepresentation, undue influence or fraud then, in every case, it is possible to contest paternity under CC 1471 §2 item 2.

Of course it should be highlighted that the court in question had ordered, as a means of proof, a medical expert report with DNA testing from which it turned out that the fertilization had been homologous, meaning that the sperm used belonged to the husband. The matter would certainly have been more complicated if the fertilization had been a *heterologous, medically assisted reproduction* without the due written (external) consent. Nevertheless, since the law does not distinguish between the type of conjugal consent required for homologous reproduction and that required for heterologous fertilization, I believe that there should be a legislative regulation so as to explicitly stipulate that consent for heterologous fertilization should be *public notarial*. This is necessary due to the fact that there exist enough court judgements already²⁴ mentioning fallacy of the father concerning the agreement made between the spouses for heterologous fertilization, where the father often invokes having been deceived so that he can establish the right to contest paternity under CC 1471.

In conclusion I would like to point out that illegal activities in medically assisted reproduction, in parallel with the legal ones, constitute an ever-exacerbating problem and for this reason some corrective interventions are necessary in the law regulating medically assisted reproduction, which has already been in effect for ten years. After all, the issues that occur cannot always be tackled on the basis of interpretation, while the recent modifications aimed at the facilitation of genetic material distribution rather than the safeguarding of kinship for children. I would suggest the following as such necessary modifications:

(a) the mandatory *notarial consent of spouses for heterologous fertilization*

(b) the *final judgement of the court ruling for the granting of permission* for surrogacy or post mortem fertilization- –even with the waiving of legal recourse

²³ See Kounougeri- Manoledaki, Family Law⁵ II, p. 143 “... article 1471 §2 section 2 cannot apply, unless there exists the written consent stipulated under article 1456 §1 item b”

²⁴ Athens CoA 2267/2011 Hellenic Justice Review 2011.1455` Athens CoA 1098/2009 Hellenic Justice Review 2009.1756=EfAD legal journal A/2012.596.

rights- despite the fact that medical practitioners have been exhibiting haste, since they first perform the implantation and then they ask for permission in contravention of the law-, and

(c) the reservation of the practice of surrogacy *only for the cases where there is a biological bond* of the child *with one of the two spouses* (sperm or eggs) because the risk of children made to measure is now becoming more than imminent, if we actually acknowledge the permissibility of their adoption at a second stage.